CHUN NYOOK LIN

v.

PENTADBIR TANAH ALOR GAJAH & ANOR

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[ORIGINATING MOTION NOS: 25-8-2001,
25-9-2001 & 25-10-2001]
11 JULY 2003

LAND LAW: *Charge - Order for sale - Setting aside - Cause to the contrary - Whether chargor's appeals filed out of time - Whether High Court had power to extend time - Whether order for sale null and void - Whether statutory notice of demand issued prematurely - Whether sum claimed in dispute - Whether chargor commenced claim by way of writ - National Land Code, ss. 418, 431(1)(b)(i), (c)(i), (d)(i), (2) Forms 16D, H - Rules of the High Court 1980, O. 55 r. 13 - Courts of Judicature Act 1964, para. 8*

CIVIL PROCEDURE: *Appeal - Time - Extension of time to file appeals - Whether High Court had power to extend time - National Land Code, s. 418 - Courts of Judicature Act 1964, para. 8*

These were appeals by the applicant ('chargor') under s. 418 of the National Land Code ('NLC') and O. 55 r. 13 of the Rules of the High Court 1980 ('RHC') against the respondents, pertaining to an order for sale of certain charged land, for the following orders: (1) that an extension of time, if necessary, be given to the chargor to file these appeals; (2) that the three orders for sale by the first respondent be set aside; (3) that the first respondent be directed to give effect to these orders making entries in the Register Document of Titles and the Issue Document of Titles; and (4) costs. The respondents raised a preliminary objection in regard to the time limit under s. 418 of the NLC *ie*, that the chargor, in filing these appeals on 13 July 2001, was out of time as the order for sale had been made by the first respondent on 27 January 2000. The chargor, however, contended that the order for sale was null and void as the land enquiry summons concerning the date and time of the enquiry was not served on her. She also submitted that Form 16D of the NLC *ie*, the statutory notice of demand, had been prematurely issued by the second respondent. Thus, it fell to this court to decide whether the chargor's appeals had merits and ought to be granted.

Held:

[1] The chargor, pursuant to s. 418(1) of the NLC, ought to have appealed on or before 17 April 2000 in order to be within the three-month time limit which began to run from 17 January 2000, which was the date when the order for sale was made in the presence of the chargor's learned counsel who appeared before the first respondent. The chargor, having filed these appeals on 13 July 2001, was clearly out of time by some 15 months. (p 382 f)

[1a] An aggrieved person under s. 418 of the NLC is given a substantive right to appeal but that right has to be exercised within three months of the decision being communicated. Paragraph 8 of the Schedule to the Courts of Judicature Act 1964 confers power on the High Court to extend time only where specific provisions for allowing it to be done is expressed in such law; however, in this case, s. 418 of the NLC does not confer any power on the High Court to extend the time period prescribed in the provision. (pp 384 h & 385 a)

[2] Although the chargor argued that the first respondent had made three orders for sale, there was no doubt that the first respondent made only one order for sale which was later incorporated in Form 16H of the NLC dated 29 February 2000. (p 386 c-e)

[2a] With regard to the chargor's contention that the order for sale was null and void as the land enquiry summons concerning the date and time of the enquiry was not served on her, the chargor appeared to have engaged in an exercise of inequitable conduct in order to enlist the assistance of equity, and she could not now invoke equity to say that the summons had not been served on her, when she had been present at an enquiry on 11 May 1999 to ask for a postponement of three months in order to settle the facilities, which was granted by the first respondent. Furthermore, service of the summons on the chargor as an individual, on the facts, constituted compliance with the provisions under s. 431(1)(b)(i), (c)(i) or (d)(i), read with (2) of the NLC. (pp 388 f, 389 c & 390 b)

[3] In regard to the chargor's submission that Form 16D of the NLC *ie*, the statutory notice of demand, had been prematurely issued by the second respondent, the chargor was given seven days from 26 August 1998 *ie*, the date of the notice of demand, to comply with it, and this ended on 2 September 1998. Since Form 16D of the NLC was issued on 3 September 1998 after the chargor had failed to comply, the chargor's argument on a premature Form 16D was therefore legally unsustainable. (p 392 c)

[4] In respect of the sum claimed by the second respondent as being legally due from the chargor in Form 16D of the NLC, since the chargor had not previously disputed the said sum, it was quite obvious that the dispute raised by the chargor in respect of the said sum appeared to have been an afterthought designed to frustrate the order for sale. (p 392 e)

[5] A claim based on an allegation of fraud may only be commenced by way of a writ whereas in this instance, there was no writ issued by the chargor nor were the issues of fraud and misrepresentation raised at the enquiry before the first respondent. (p 393 a-b)

[Appeals dismissed.]

Case(s) referred to:

Aik Ming (M) Sdn Bhd v. Chang Ching Chuen & Ors and Another Appeal [1995] 3 CLJ 639 CA ***(refd)***

Alagarsamy v. Tai Phaik Kee & Anor [1992] 1 CLJ 93 HC ***(refd)***

Bank Bumiputra Malaysia Bhd v. Doric Development Sdn Bhd [1987] 1 CLJ 383 [1987] CLJ (Rep) 486 HC ***(refd)***

Bank Bumiputra Malaysia Bhd v. Mahmud Hj Mohamed Din (Datin Hjh Salma Md Jamin, intervener) [1989] 1 MLJ 381 HC ***(refd)***

Bradley v. Riches [1878] 9 Ch D 189 ***(refd)***

Collector of Land Revenue, Federal Territory v. Garden City Development Bhd [1979] 1 MLJ 223 ***(refd)***

Chai Hup & Sons Sdn Bhd v. Overseas Union Bank Ltd & Ors [1993] 2 AMR 52 HC ***(refd)***

Chong Hin v. Yap Sin Yee [1934] MLJ 68 ***(refd)***

Citibank NA v. Ooi Boon Leong & Ors [1981] 1 MLJ 282 FC ***(refd)***

Deraman & Ors v. Mek Yam [1977] 1 MLJ 52 ***(refd)***

Doshi v. Yeoh Tiong Lay [1975] 1 MLJ 85 FC ***(refd)***

Eu Finance Bhd v. Lim Yoke Foo [1982] 2 MLJ 37 FC ***(refd)***

Garden City Development Bhd v. Collector of Land Revenue, Federal Territory [1982] CLJ 346; [1982] CLJ (Rep) 20 PC ***(refd)***

Jacob v. Oversea-Chinese Banking Corporation, Ipoh [1974] 2 MLJ 161 FC ***(refd)***

Kandiah Peter v. Public Bank Bhd [1993] 4 CLJ 332 SC ***(refd)***
Kekatong Sdn Bhd v. Bank Bumiputra (M) Bhd [1998] 2 CLJ 266 CA ***(refd)***
Kulsekarapatnam Co-operative Society v. Radhelal [1971] AMP 191 ***(refd)***
Land Executive Committee of Federal Territory v. Syarikat Harper Gilfillan Bhd [1981] 1 MLJ 234 ***(refd)***
Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 SC ***(refd)***
Lim Yoke Foo v. Eu Finance Bhd [1985] 1 MLJ 17 ***(refd)***
Lum Choon Realty Sdn Bhd v. Perwira Habib Bank Malaysia Bhd [2000] 3 CLJ 119 CA ***(refd)***
Majlis Peguam & Anor v. Tan Sri Dato' Mohamed Yusoff Mohamed [1997] 3 CLJ 332 HC ***(refd)***
Mohd Nadir A Syed Ahamed & Lain-lain lwn. Zubaidi Abdul Hamid & Lain-lain [2000] 6 MLJ 241 HC ***(refd)***
Mohd Nadir A Syed Ahamed & Ors v. Zubaidi Abdul Hamid & Ors [1994] 3 CLJ 205 HC ***(foll)***
Overseas Union Bank (M) Bhd v. L & L Properties Sdn Bhd [1999] 3 CLJ 47 HC ***(refd)***
Penara Jaya Sdn Bhd v. Kemajuan Flora Sdn Bhd (SP 24-259-2001) (unreported) ***(refd)***
Rampal Singh v. Balbhaddar Singh [1902] 29 IA 203 ***(refd)***
Rasiah Munusamy v. Lim Tan & Sons Sdn Bhd [1985] 2 MLJ 291 ***(refd)***
Seah Choon Chye v. Saraswathy Devi [1971] 1 MLJ 112 ***(refd)***
Shell Malaysia Trading Sdn Bhd v. Pemungut Duti Setem, Pulau Pinang [1998] 1 CLJ Supp 126 HC ***(not foll)***
Sia Siew Hong & Ors v. Lim Gim Chian & Anor [1996] 3 CLJ 26 CA ***(refd)***
Siong Holdings Sdn Bhd v. Development & Commercial Bank Bhd [1997] 1 CLJ 590 CA ***(refd)***
Shobhana Jigarlal Doshi lwn. Pendaftar Hakmilik Tanah Dan Galian Johor [1996] 4 MLJ 664 ***(refd)***
Stuart v. Kingston [1923] 32 CLR 309 ***(refd)***
Syarikat Kewangan Melayu Raya Bhd v. Malayan Banking Bhd [1984] 1 CLJ 78; [1984] 1 CLJ (Rep) 363 FC ***(refd)***
Tham Soon Hang v. Perumahan Utara Jaya Sdn Bhd (No: 31-408-1986) (Unreported) ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 182
Courts of Judicature Act 1964, s. 25(2), (5), para 8
Land Settlement Ordinance (Kelantan) 1955, ss. 5, 8(1), 16
Legal Profession Act 1976, s. 15(5)
National Land Code, ss. 33, 128, 260(2), 261, 262, 263, 418(1), Forms 16D, H
National Land Code (Amendment) Act 1984, s. 3(iii)
Rules of the High Court 1980, O. 5 r. 2(b), O. 55 r. 13
Stamp Act 1949, s. 39(1)

Contracts and Specific Relief Acts [India], s. 299

Other source(s) referred to:
14 Halsbury's Laws, 3rd edn, para 1019, p 543
Indian Contract and Specific Reliefs Act, vol II, 3rd Reprint 1999, pp 1171, 1172
Pollock & Mulla, *Indian Contract And Specific Reliefs Act,* Vol. II 3rd Reprint 1999 p 1171
Spry, *Equitable Remedies,* 2nd edn, p 236

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing J:

Notices Of Motion

The applicant chargor ("the chargor") has filed three notices of motion under s. 418 of the National Land Code 1965 and O. 55 r. 13 of the Rules of the High Court 1980 ("these appeals") against the same respondents for the following orders:

1. that an extension of time, if necessary, be given to the chargor to file these appeals;

2. that "the three orders for sale" by the Alor Gajah Land Administrator ie, the first respondent on 27 January 2000, 29 February 2000 and 31 January 2001 respectively be set aside;

3. that the first respondent be directed to give effect to these orders by making entries in the Register Document of Titles and the Issue Document of Titles; and

4. costs.

By consent of all parties herein, the motions were heard together.

The volumes of cause papers, submissions and authorities run into more than two feet in thickness, which had been made possible essentially by the enormous energy and effort of the charger's learned counsel.

Unless otherwise specifically stated, all references to a section and an order are references to that section and order in the National Land Code 1965 and the Rules of the High Court 1980 respectively.

Facts Of The Case

In consideration of Affin Bank Bhd, the second respondent, giving an overdraft facility of RM1 million and a term loan of RM500,000 ("the said facilities") to one Jati Erat Sdn Bhd ("the borrower"), the chargor by way of third party charges charged two pieces of land *viz.* GM 169 Lot 577 and GM 306 Lot 1533, both in the mukim of Durian Tunggal, district of Alor Gajah, Melaka ("the said charges") as security in favour of the second respondent. The chargor was also one of the three guarantors for the said facilities.

The borrower defaulted in the repayment of the said facilities and judgment was obtained in this court on 21 April 1999 by the second respondent against the borrower and the three guarantors, including the charger in Civil Suit No. 22-181-1998.

For the purposes of enforcing the said charges, a notice of demand dated 26 August 1998 was served on the chargor.

On 3 September 1998, Form 16D was served on the chargor by way of substituted service.

The chargor received a copy of the summons dated 24 April 1999 issued by the second respondent requiring the chargor's attendance before the first respondent for an enquiry under s. 260(2) to show cause why an order for sale should not be made.

On 11 May 1999, an enquiry was conducted by the first respondent. The second respondent was represented by the firm of solicitors Messrs Taye & Co. while the applicant was represented by Mr. YC Pok of YC Pok & Partners.

After hearing submissions, the first respondent was satisfied that the chargor could not show any cause to the contrary. However, the first respondent acceded to the chargor's request for three months to settle the second respondent's claim, failing which the first respondent would proceed further with the enquiry.

As the chargor failed to settle, the first respondent proceeded further with the enquiry on 27 January 2000 in the presence of, *inter alia*, one learned counsel Miss Lalitha a/p Nagamuthu from Messrs YC Pok & Partners appearing for the chargor, and as no cause to the contrary was shown by the chargor or the chargor's said counsel, an order for sale was made by the first respondent, who fixed the auction sale for 10 June 2000, but it was postponed to 24 June 2000 as 10 June 2000 was a public holiday.

The said order for sale was incorporated in Form 16H dated 29 February 2000 and gazetted on 13 April 2000.

However the auction sale fixed for 24 June 2000 could not proceed as the area of the two pieces of land ("the land") was erroneously stated in the proclamation of sale.

On 30 October 2000, pursuant to an order of the first respondent, the error in the area of the land was amended and a new auction sale was fixed for 28 April 2001. All parties were informed *vide* Form 16H dated 31 January 2001 and the first respondent's letter dated 11 April 2001.

The auction sale on 28 April 2001 proved abortive as there was no bidder.

The chargor filed these appeals on 13 July 2001. Further auction sale was stayed until the final disposal of these appeals.

Time-Limit Under S. 418

Datuk Nor Bee bt Ariffin learned state legal adviser assisted by En. Wan Zainul Azamin bin Hamid @ Khamid learned federal counsel for the first respondent, and En. Mark S. Taye, learned counsel for the second respondent, raised a common preliminary objection pertaining to the time-limit under s. 418 ie, that the chargor in filing these appeals on 13 July 2001 was out of time as the order for sale was made by the first respondent on 27 January 2000.

In response, En. Azad Bashir, learned counsel for the chargor, submitted that the order for sale dated 27 January 2000 was never communicated to the chargor as it was made in the absence of the chargor who was informed by one Goh Ai Ling, a clerk of the borrower, in May 2001, as a result of which these appeals filed on 13 July 2001 were still within the three-month time-limit under s. 418.

In my judgment, the aforesaid submissions call for the consideration of s. 418(1) which where relevant merits reproduction as follows:

> **418 Appeals to the Court**
>
> (1) Any person ... aggrieved by any decision under this Act of ... any Land Administrator may, at any time within the period of three months beginning with the date on which it was communicated to him, appeal therefrom to the Court.

Section 418(1) has been judicially considered by the Federal Court in *Land Executive Committee of Federal Territory v. Syarikat Harper Gilfillan Berhad* [1981] 1 MLJ 234, which was cited for the first respondent. Raja Azlan Shah, Ag LP (now HRH Sultan of Perak) in delivering judgment of the Court held, *inter alia*, that the time-limit is the foundation of the right given in the section and that the period of three months is obviously for the purpose of preventing stale claims. This specific procedure is exclusive (see also *Shobhana Jigarlal Doshi lwn. Pendaftar Hakmilik Tanah Dan Galian Johor (Lee Ee Khuan dan lain-lain, pencelah)* [1996] 4 MLJ 664 at p. 671 E-F per Haidar J (now CJ(M)); *Tham Soon Hang v. Perumahan Utara Jaya Sdn Bhd* (unreported) in Alor Setar High Court 31-408-1986 dated 11 March 2001).

In relation to the three-month time-limit beginning with the date on which a decision is communicated to the chargor, the facts are absolutely clear that when the order for sale was made by the first respondent on 27 January 2000, the chargor's then learned counsel Cik Lalitha was present in her capacity as the authorised agent or representative of the chargor. There can be no doubt that the communication to the said counsel present at the making of the said order for sale on 27 January 2000 constituted a communication to the chargor.

In *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239, the then Supreme Court held that a solicitor who was authorised to act on behalf of a bank was an agent of the bank and therefore service by the solicitor of a notice of demand acting for the bank is a valid service.

The Court of Appeal held in *Aik Ming (M) Sdn Bhd v. Chang Ching Chuen & Ors and Another Appeal* [1995] 3 CLJ 639, *inter alia*, that except where the solicitor acts fraudulently *vis-a-vis* his client, it is settled that the knowledge of a solicitor is regarded by law as the knowledge of the client, so that it is not open to the client to say that the solicitor did not disclose the true facts to him: *Doshi v. Yeoh Tiong Lay* [1975] 1 MLJ 85 FC; *Holland v. Hart* [1870] Ch. App. 678, 681 followed by the High Court of Australia in *Stuart v. Kingston* [1923] 32 CLR 309; *Bradley v. Riches* [1878] 9 Ch D. 189; *14 Halsbury's Laws* (3rd Ed.) para 1019 at p. 543.

Further, I am of the view that s. 182 of the Contracts Act 1950 applies here. It provides as follows:

> 182. Any notice given to or information obtained by an agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequences as if it had been given to or obtained by the principal.

Pollock And Mulla on *Indian Contract And Specific Reliefs Act* Vol. II 3rd Reprint 1999 p. 1171 sets out s. 299 of the Indian Contract and Specific Relief Acts which is in *pari materia* with s. 182 of our Contracts Act 1950 and comments that s. 299 is intended to declare a general principle of law and refers to a passage in the judgment of the Privy Council in *Rampal Singh v. Balbhaddar Singh* [1902] 29 I.A. 203 at p. 212 in the following words:

> It is not a mere question of constructive notice or inference of fact, but a rule of law which imputes knowledge of an agent to the principal, or, in other words, the agency extends to receiving notice on behalf of his principal, or, in other words, the agency extends to receiving notice on behalf of his principal of whatever is material to be stated in the course of the proceedings.

(see also *Kulsekarapatnam Co-operative Society v. Radhelal* [1971] AMP 191.)

The learned authors continued at p. 1172 that:

> "This section, however, provides that no sooner a notice is served upon an agent it shall have the same legal consequences as if it had been given to the principal. It does neither expressly nor by necessary implication defer the legal consequences until the expiry of a reasonable time needed for the agent to communicate to the principal.": *State of Orissa v. Goenka Investment & Mining Industries Pvt. Ltd* A.I.R. [1983] Cal. 438.

(See also *Penara Jaya Sdn Bhd v. Kemajuan Flora Sdn Bhd*. Melaka High Court II SP.24-259-2001).

The chargor's remedy under s. 418(1) is therefore to appeal on or before 27 April 2000 in order to be within three-month time-limit which began to run from 27 January 2000, when the order for sale was made in the presence of the charger's learned counsel who appeared before the first respondent. The chargor having filed these appeals on 13 July 2001, was clearly out of time by some 15 months.

Extension Of Time

The next crucial question is whether this court may grant an extension of time under s. 418(1) pursuant to prayer (1) in these appeals.

In this connection, it was argued for the second respondent that the three-month time-limit under s. 418(1) must be strictly adhered to as no extension of time may be allowed.

The contention for the chargor is to the contrary, citing s. 25(2) and para 8 of the Schedule to the Courts of Judicature Act 1964 ("CJA 1964"); *Shell Malaysia Trading Sdn Bhd v. Pemungut Duti Setem, Pulau Pinang* [1998] 1 MLJ 726; *Collector of Land Revenue, Federal Territory v. Garden City Development Berhad* [1979] 1 MLJ 223 FC; *Garden City Development Berhad v. Collector of Land Revenue, Federal Territory* [1982] CLJ 346; [1982] CLJ (Rep) 20 PC and *Deraman & Ors. v. Mek Yam* [1977] 1 MLJ 52.

I shall first consider the authorities cited for the chargor.

In *Shell Malaysia Trading, supra,* the issue before the court concerns the construction of the word "assessment" in s. 39(1) of the Stamp Act 1949 regarding the effective date from which the stipulated 21-day appeal period thereunder has to be calculated. There was also an application for leave to file the appeal under the said s. 39(1) out of time if the court were to decide that the appeal was filed after the stipulated period.

The said s. 39(1) reads as follows:

> Any person who is dissatisfied with the assessment of the Collector may, within twenty-one days after the date of assessment and upon payment of duty in conformity therewith, appeal against the assessment in the High Court, and may for that purpose require the Collector to state and sign a case, setting forth the question, upon which his opinion was required, and the assessment made by him.

Vincent Ng J held that the appeal has been filed well within the time limit prescribed by the said s. 39(1), and that as viewed within the context of the whole Act, the provision as to time set forth therein was merely directory or declaratory rather than mandatory in nature. His Lordship exercised the discretion under para 8 of the Schedule to s. 25(2) of the CJA 1964.

It is obvious that the said s. 39(1) which required judicial scrutiny and determination in *Shell Malaysia Trading* is not in *pari materia* with s. 418(1) before me. The learned judge was not called upon to determine whether there is any section in the Stamp Act 1949 specifically providing for an extension of time under the said s. 39(1). I shall revert to *Shell Malaysia Trading* later in my judgment.

Next, the advice of Lord Keith of Kinkel delivered on behalf of the Privy Council in *Garden City Development, supra,* does not appear to be even remotely related to an application for extension of time pursuant to s. 418(1). At pp. 100 and 101, after dealing with the issue as to whether the appellant's appeal to the High Court was out of time, the Privy Council stated that in a

timeous appeal against the s. 128 notice, the appellants were in a position to open up all matters upon which its validity depended.

In *Deraman, supra,* the judgments of Suffian LP and Ong Hock Sim, FJ showed that the sole issue before the Federal Court was whether the appellants had the right to institute proceedings in the High Court in respect of land, their claim to which had been adjudicated by the District Officer in a public enquiry held under s. 5 of the Kelantan Land Settlement Ordinance 1955 against a person in whose favour the District Officer has decided and who had, pursuant to that decision, been issued with a possessory title under s. 8(1) thereof instead of appealing against the order of the District Officer as provided by s. 16 thereof.

In a majority judgment, Ali FJ and Ong Hock Sim FC (Suffian LP dissenting) held that the appellants who were aggrieved by an order made in pursuance of the Ordinance may appeal from such order to the District Officer, and thereafter to the High Court, in the manner prescribed by s. 418. In my view, that was the *ratio decidendi* of the majority judgment.

Ong Hock Sim FJ, at p. 53 right, added as follows:

> Section 418 of the National Land Code enacts that an appeal to the court must be brought within three months from the date of communication of the order of the District Officer, though the High Court has power to extend the period of time upon special grounds being shown.

The above passage on which the chargor herein relied is, with the utmost respect, an *obiter dictum* as the issue before the Federal Court was not whether an extension of time ought to be granted under s. 418(1).

In *Mohd Nadir bin A Syed Ahamed & Ors v. Zubaidi bin Abdul Hamid & Ors* [1994] 3 CLJ 205 HC, which was cited for the second respondent, the applicants who were aggrieved with a decision of the Langkawi Land Administrator filed an appeal in the High Court Alor Setar under s. 418, but were late by one day. Their application for extension of time so as to validate their appeal was dismissed by KC Vohrah J (later JCA) who held, *inter alia*, that:

(1) an aggrieved person under s. 418 is given a substantive right to appeal but that right has to be exercised within three months of the decision being communicated;

(2) para 8 of the Schedule to the CJA 1964 confers power on the High Court to extend time only where specific provisions for allowing it to be done is expressed in such law; and

(3) s. 418 in this case does not confer any power on the High Court to extend the time prescribed in the provision.

The chargor's appeal, against the above decision, to the Federal Court was dismissed: see p. 246B, in the judgment of Alauddin J (now JCA) in *Mohd Nadir bin A Syed Ahatned & Lain-lain lwn. Zubaidi bin Abdul Hamid & Lain-lain* [2000] 6 MLJ 241 HC.

For completeness, s. 25(2) and para 8 of the Schedule to the CJA 1964 are reproduced as follows:

> 25(2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:
>
> Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.
>
> Time
>
> 8. Power to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding, although any application therefor be not made until after the expiration of the time prescribed:
>
> Provided that this provision shall be without prejudice to any written law relating to limitation.

Having regard to s. 25(2) and para 8 of the Schedule to the CJA 1964 and s. 418(1), I am in entire agreeement with the judgment of KC Vohrah J (later JCA) and apply the reasons contained therein to these appeals. Meanwhile, with the utmost respect, I decline to follow *Shell Malaysia Trading, supra*.

A reverse situation, to abridge the time prescribed under a specific provision, arose in *Majlis Peguam & Anor v. Tan Sri Dato' Mohamed Yusoff bin Mohamed* [1997] 3 CLJ 332 FC, where the respondent applied for abridgement of the three months required under s. 15(5) of the Legal Profession Act 1976 for posting notices of his petition for admission as an advocate and solicitor.

As the said s. 15(5) does not contain an express provision for abridgement, the respondent relied on the said para 8. The High Court held that it had the necessary power to allow the application upon reading the said s. 25(2) and para 8. On appeal, the Supreme Court held that para 8 is a general power-conferring provision and that power is to be exercised judicially whenever circumstances demanded, in accordance with any existing written law or rules of court relating thereto.

The Supreme Court explained that a prescribed time in eg, the said s. 15(5) is always presumed and construed as mandatory unless there is express power in that particular law to abridge or extend time, and that the said para 8 is a general measure whereas the said s. 15(5) is a specific measure with no power given to enlarge or abridge time, in which case the specific measure overrides the general measure.

How Many Orders For Sale?

In these appeals, the chargor's learned counsel argued that the first respondent has made three orders for sale *viz*:

1. on 27 January 2000, at the enquiry before the first respondent;
2. on 29 February 2000 through Form 16H; and
3. on 31 January 2001 through another Form 16H.

For the first and the second respondents, their respective learned counsel submitted that there was only one order for sale ie, that made by the first respondent on 27 January 2000 contained in Form 16H dated 29 February 2000 while the other Form 16H dated 31 January 2001 was a notice to all parties concerning the new auction date.

In my judgment, there is no doubt that the first respondent made only one order for sale which was later incorporated in Form 16H dated 29 February 2000. That was consistent with the procedure contained s. 263(1) and (2) which, where relevant, merit reproduction as follows:

> **263 Order for sale, and matters to be dealt with thereby**
>
> (1) At the conclusion of any enquiry under section 261, the (Land Administrator) shall order the sale of the land ... to which the charge in question relates unless he is satisfied of the existence of cause to the contrary.
>
> (2) Every such order shall be in Form 16H, and shall:
>
> (a) provide for the sale to be by public auction;
>
> (b) specify the date on which the sale is to be held, being a date not less than one month after the date on which the order is made;
>
> (c) specify the amount due to the chargee at the date on which the order is made; and
>
> (d) fix a reserve price for the purpose of the sale, being a price equal to the market value of the land ... in question as estimated by the (Land Administrator).

Form 16H dated 29 February 2000 is indeed a reflection of the order for sale dated 27 January 2000. It seems clear to me that there is nothing in the National Land Code 1965 requiring Form 16H to be issued on the same date as the order for sale, since Form 16H is normally prepared after the date of the order for sale. Further, in these appeals, the same reserve price was fixed pursuant to the order for sale dated 27 January 2000 as reflected in Form 16H dated 29 February 2000.

In *Eu Finance Berhad v. Lint Yoke Foo* [1982] 2 MLJ 37 FC, the appeal involved an issue as to the validity vel non of an order for the sale of land made by the Collector of Land Revenue (now redesignated as Land Administrator under s. 3(iii) of the National Land Code (Amendment) Act 1984 (Act A587) with effect from 25 March 1985) on 26 December 1979 in Form 16H under s. 263 after a similar order for sale after due enquiry under ss. 261 and 262 had been made by another collector on 15 June 1976. The Federal Court held, *inter alia*, that as soon as the collector made the first order under s. 263, he was *functus officio* save as to his power under s. 263(4) to postpone the sale ordered or to formally rectify the first order within the purview of s. 33 with no power to make another or subsequent order for sale under s. 263. This was affirmed on appeal by the Privy Council in *Lim Yoke Foo v. Eu Finance Berhad* [1985] 1 MLJ 17. These two authorities cited for the chargor are in my view of no assistance to the chargor.

The position is these appeals will be best understood by a careful analysis of the facts and circumstances in similar cases.

In *Lum Choon Realty Sdn Bhd v. Perwira Habib Bank Malaysia Bhd* [2000] 3 CLJ 119, after an enquiry, an order for sale was made by the Land Administrator in Form 16H and an auction date was fixed. The parties thereafter entered into negotiations for settlement and the auction did not take place on the appointed date. When there was no settlement the respondent applied to the Land Administrator for a new auction date and a new reserve price. After hearing, the Land Administrator issued a second Form 16H for the land to be sold by public auction. The appellant applied to the High Court to set aside the second Form 16H but failed. An appeal to the Court of Appeal was dismissed, as the Land Administrator had acted well within his powers and jurisdiction when he fixed a new auction date and reserve price but had unwittingly committed the error by issuing a second Form 16H, as there was no second order for sale, neither was the original order for sale cancelled.

In *Chai Hup & Sons Sdn Bhd v. Overseas Union Bank Limited & 2 Ors* [1993] 2 AMR 52, 3597, HC, the Land Administrator made an order for sale *via* Form 16H on 30 October 1990 fixing a reserve price. On 23 July 1992, another Form 16H (1992 order) was issued, which fixed the reserve price and auction date. The issue was whether the 1992 order was a second order for sale. KC Vohrah J (later JCA) answered it in the negative.

Validity Of Order For Sale

It was contended for the chargor that the order for sale dated 27 January 2000 was null and void as the land enquiry summons ("the summons") concerning the date and time of the enquiry was not served on the chargor.

For the second respondent, it was submitted that the summons was posted to the chargor at two addresses *viz.*

1. No. 9, Jalan Chenderai Dua, Lucky Garden, Bangsar 50100 Kuala Lumpur which was one of the addresses of the chargor; and

2. No. 29B, Jalan Tun Perak, 75300 Melaka which is the address of the borrower and which the chargor furnished to the second respondent.

It was also submitted that the chargor has failed to inform the first and the second respondents of her change of address to Kelana Putri Condo, Kelana Jaya until these appeals came to light.

In my view, the chargor appears to have engaged in an exercise of inequitable conduct in order to enlist the assistance of equity. Although such inequitable conduct does not constitute fraud in the common law sense of that word, it is in my view tantamount to an unmeritorious and unconscionable conduct coming within the ambit and purview of constructive or equitable fraud: see Spry on *"Equitable Remedies"* 2nd edn at p. 236 and the judgment of Mohd Azmi SCJ in *Rasiah Munusamy v. Lim Tan & Sons Sdn Bhd* [1985] 2 MLJ 291 at p. 296.

The chargor's inequitable conduct would necessitate the application of the doctrine "equity will not permit a statute to be used as an engine of fraud".

Gopal Sri Ram JCA in *Sia Siew Hong & Ors v. Lim Gim Chian & Anor* [1996] 3 CLJ 26 at p. 42 eludicated as follows:

The doctrine, when invoked, has the effect of precluding a litigant who is guilty of unconscionable or unmeritorious conduct from relying upon a statutory provision that would defeat his opponent's case. An application of the doctrine requires a meticulous examination of the facts and circumstances of the particular case to determine whether there has been any inequitable conduct. The doctrine has been applied to several statutes, including those governing contracts, wills, trusts and assignments. The categories of statutes to which the doctrine may be applied are not closed and I am certainly unable to find any serious impediment in applying it to bar a litigant from raising and relying upon the provisions of the Limitation Act 1953.

In my view, the chargor cannot now invoke equity to say that the summons has not been served on her, when she was present at the enquiry on 11 May 1999 to ask for a postponement of three months in order to settle the facilities, which postponement was granted by the first respondent.

On the date of the continued enquiry, the chargor was duly represented by learned counsel Cik Lalitha from YC Pok & Partners.

Still on the question of service of the summons on the chargor, s. 431 provides for the method of service, where relevant to these appeals, as follows:

431 Methods of service

(1) Without prejudice to any other method of service, a notice may be served on a person ... for the purposes of this Act:

(a) ...; or

(b) by delivering the notice:

(i) at the person's usual or last known place of abode or business to his servant or to an adult member of his family; or

(ii) ...; or

(c) by leaving the notice in a cover addressed to the person:

(i) at the person's usual or last known abode or place of business; or

(ii) ...; or

(d) by sending the notice by pre-paid registered post to the person ... at an address for service given in pursuance of any provision of this Act or, where no such address has been given:

(i) at the person's usual or last known abode or place of business; or

(ii) ...; or

(2) A notice served by pre-paid registered post under paragraph (d) of subsection (1) shall be deemed to have been served at the time when the letter containing the notice would be delivered in the ordinary course of post; and it shall be sufficient proof of service that the letter was properly addressed in accordance with that paragraph and placed in the post;

Provided that, where the letter is returned through the post undelivered, the notice shall not be deemed to have been served.

In my judgment, service of the summons on the chargor as an individual at the aforesaid two addresses constitutes compliance with the provisions under s. 431(1)(b)(i), (c)(i) or (d)(i), read with s. 431(2).

Kekatong Sdn Bhd v. Bank Bumiputra (M) Bhd [1998] 2 CLJ 266 CA, from which the chargor sought support, concerned the service of documents on a company registered under the Companies Act 1965, as opposed to an individual, and so does not assist the chargor in any way.

It is instructive to observe that the service of Form 19C at the caveator's place of abode on an adult member of the caveator's family was held to have been served on the caveator in compliance with s. 431(1)(b)(i): per Edgar Joseph J (later FCJ) in *Alagarsamy v. Tai Phaik Kee & Anor* [1992] 1 CLJ 93 HC. The learned judge added that by reason of s. 431, service of Form 19C need not be personal.

Service by way of pre-paid registered post of Form 19C on a caveator at the address given in the application for entry of a private caveat has been held to be good service in compliance with s. 431(1)(d)(i) notwithstanding the caveator's allegation that the recipient's signature was not his: per Haidar J (now CJ(M)) in *Shobna Jigarlal Doshi, supra.*

Further, in these appeals, there was nothing in the chargor's affidavit in connection with the service of the summons to indicate that she was in any way misled or prejudiced in so far as the enquiry before the first respondent was concerned.

Form 16D

The next point raised for the charger was that Form 16D ie, the statutory notice of demand had been prematurely issued by the second respondent. I am of the view that it is devoid of substance and merit.

A chargor's merely legalistic arguments have been frowned upon by our courts especially where a chargor has not been misled or prejudiced.

By way of illustration, in *Syarikat Kewangan Melayu Raya Bhd. v. Malayan Banking Bhd.* [1984] 1 CLJ 78; [1984] 1 CLJ (Rep) 363, FC the High Court dismissed the chargor's application to set aside an order for sale of the then Collector of Land Revenue. On appeal, it was argued that:

1. the heading of the two notices in Form 16D referred to "a charge" and not with respect to "charges", whereas two charges were shown in the Schedule thereto, and both notices were therefore invalid and bad in law;

2. the chargee ought to have issued a separate statutory notice for each of the two charges, and each notice should contain the outstanding sum under each charge. To lump together all the amount due under both the charges were bad in law and would render both notices ineffective. The appeal was dismissed.

The High Court judgment of Peh Swee Chin, J (later FCJ) was upheld by the Federal Court on the ground, *inter alia*, that the chargor could not be said to have been prejudiced or misled.

In *Jacob v. Oversea-Chinese Banking Corporation, Ipoh* [1974] 2 MLJ 161 FC, it was argued that no order for sale should have been given as Form 16E should have been used instead of Form 16D. The Federal Court had absolutely no difficulty in dismissing the chargor's appeal. Suffian LP held that either form may be used, so long as sufficient notice has been given to the chargor.

In *Bank Bumiputra Malaysia Bhd v. Mahmud bin Haji Mohamed Din (Datin Hajjah Salma bte Md Jamin, Intervener)* [1989] 1 MLJ 381 HC, the intervener raised two grounds of objection, one of which was that Form 16D was defective because though it mentioned that the breach of a provision of the charge had continued for a period of seven days prior to the date of Form 16D, such a breach in fact had continued not for a full seven days but for a period of about six days.

Peh Swee Chin J (later FCJ) dismissed the objection as being extremely legalistic in the circumstances, following *Jacob*, above.

Again in *Bank Bumiputra Malaysia Berhad v. Doric Development Sdn. Bhd.* [1987] 1 CLJ 383; [1987] CLJ (Rep) 486, the same learned judge dismissed as legalistic and technical the point taken for the defendant that an application for an order for sale under s. 254(3) and (6) could be filed only after the expiry of the period specified in Form 16D.

The question whether Form 16D has been issued prematurely must be determined by looking at the period for repayment stated in the notice of demand and not in Form 16D: *Overseas Union Bank (M) Bhd v. L & L Properties Sdn Bhd* [1999] 3 CLJ 47 HC per Clement Skinner JC (now J).

In *Chong Hin v. Yap Sin Yee* [1934] MLJ 68, the chargor who appeared at the enquiry before the collector raised no objection to the form of the notice. Terrell Ag. CJ held that unless the defect in the notice deprived the collector of jurisdiction, it was quite clear that any technical defect in the form of the notice would not vitiate the proceedings.

In the instant case, the chargor was, pursuant to cl. 1.02 of the charge, given seven days from 26 August 1998 ie, the date of the notice of demand to comply with it, ending on 2 September 1998. Form 16D was issued on 3 September 1998 when the chargor failed to comply. The chargor's argument on a premature Form 16D is therefore legally unsustainable.

Sums Claimed By Second Respondent

In respect of the sums claimed by the second respondent as being legally due from the chargor in Form 16D, it appears to me that the chargor has not prior to these appeals disputed the said sums, but had instead informed the first respondent at the enquiry on 11 May 1999 of her intention to settle the said sums by way of a RM5 million loan from another bank. Quite obviously, the dispute raised by the chargor in respect of the said sums appears to be an afterthought designed to frustrate the order for sale.

Further, cl. 9.14 of the charge is a conclusive evidence clause which attracts the application of the principle enunciated by Raja Azlan Shah CJ (M) (now HRH the Sultan of Perak) in *Citibank N.A. v. Ooi Boon Leong & Ors.* [1981] 1 MLJ 282 FC that for the purposes of fixing liability, the applicant-debtor's indebtedness may be established conclusively by a certificate from the chargee bank: see also *Siong Holdings Sdn Bhd v. Development & Commercial Bank Bhd* [1997] 1 CLJ 590 CA; *Kandiah Peter v. Public Bank Bhd* [1993] 4 CLJ 332).

Any Cause To The Contrary

The chargor's learned counsel has in these appeals raised issues of fraud and misrepresentation to defeat the charges.

It is basic that a claim based on an allegation of fraud may only be commenced by way of a writ: O. 5 r. 2(b) of the Rules of High Court 1980; see also *Seah Choon Chye v. Saraswathy Devi* [1971] 1 MLJ 112, 114. *Viva voce* evidence, as opposed to affidavit, is necessary to establish fraud, and I would add, misrepresentation. There was no writ issued by the chargor nor were the issues of fraud and misrepresentation raised at the enquiry before the first respondent.

This submission by the chargor's learned counsel's gives me the inevitable impression that a feeble attempt to ventilate on any issue is better than none, despite the demerits inherent in such an exercise which obviously results in futility.

Conclusion

The foregoing grounds demonstrate that these appeals are devoid of merits and are hereby dismissed with costs.